



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Hollis/Brookline Cooperative School Board

Complainant

v.

Hollis Education Association/NEA-NH

Respondent

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Case No: E-0037-1

Decision No. 2007-173

APPEARANCES

Representing the Complainant:

Thomas M. Closson, Esq., Flygare, Schwarz, & Closson

Representing the Respondent:

James F. Allmendinger, Esq., NEA-NH
Phillip G. Pratt, Uniserve Director, NEA-NH

BACKGROUND

Hollis/Brookline Cooperative School Board ("School Board") filed an unfair labor practice complaint on May 14, 2007 alleging that the Hollis Education Association/NEA-NH ("Association") improperly demanded arbitration in violation of RSA 273-A:5 II(f). The School Board contends the Association is precluded from proceeding to arbitration by virtue of the disposition of a prior grievance concerning the same subject, namely a bargaining unit member's placement on the school district's salary schedule and that the present grievance is untimely. The School Board requests that the PELRB issue an injunction prohibiting the Association from continuing to demand and/or pursue arbitration in this matter; and award to the School Board the costs it has incurred in having to seek this relief.

The Association filed its answer denying the School Board's charge on June 11, 2007. The Association asserts that it is not precluded from seeking arbitration at this time because their member's placement on the district salary track is a continuing violation. The Association also states that there are differences between the present arbitration demand and an earlier demand for arbitration it had made on behalf of the bargaining unit member. The Association contends that in the current arbitration it is making a different argument, namely that the school district made a commitment to the bargaining unit member at the time of hire which justifies and requires that the Association's present request that his placement on the salary schedule be satisfied by the School Board. For its part, the Association requests that the PELRB deny the School Board's complaint thereby sending the parties to arbitration.

A pre-hearing conference was conducted before a hearing officer on June 28, 2007 at which both parties were represented by counsel. Following the granting of an assented continuance requested by the Association and a second continuance ordered due to a scheduling conflict at the PELRB, the final evidentiary hearing was rescheduled and conducted on October 9, 2007. Both parties were present, represented by counsel, presented witnesses and exhibits and had the opportunity to cross-examine witnesses. The parties submitted a "Statement of Stipulated Facts" that appear below as Findings of Fact #1 through #8. Additional findings were found by the Board as a result of the evidentiary hearing. At the conclusion of the evidence, the Board granted the parties' request to be allowed to file legal memoranda and held the record open until October 24, 2007 for that purpose. The Board then reviewed all filings submitted by the parties, considered and weighed the credibility of all witnesses and of all relevant evidence and determined the following:

FINDINGS OF FACT

1. Hollis/Brookline Cooperative School Board (the "School Board") and the Hollis Education Association (the "Association") are parties to a collective bargaining agreement (the "CBA") with the dates 2006 through 2009.
2. In the fall of 2004, the Association filed a grievance on behalf of the Hollis/Brookline teacher Donald Boggis. The basis for the grievance was the Association's claim that Mr. Boggis had been improperly placed on the Hollis/Brookline Cooperative School District's salary schedule.
3. By letter dated November 5, 2004, the Association withdrew its grievance.
4. In the spring of 2006 the Association filed for arbitration of the grievance.
5. The School Board, through its legal counsel, argued that the grievance was not arbitrable because it had previously been withdrawn by the Association..
6. Before the arbitrator could rule on the issue of arbitrability, the Association once again withdrew its grievance.

7. On December 12, 2006, the Association filed a new grievance on the issue of Mr. Boggis' placement on the Hollis/Brookline Cooperative School District's salary schedule.
8. By letter dated February 13, 2007, the Association demanded arbitration on its new grievance, and the present Unfair Labor Practice Charge followed.
9. Article IV GRIEVANCE PROCEDURE, Section 4.4 of the parties collective bargaining agreements (CBA) at least since July 1, 2003 and continuing through the presently effective CBA provides:

A grievance to be considered under this procedure must be initiated in writing within twenty (20) school days of its occurrence, or within twenty (20) school days of when the party should have known of the occurrence.

(See Joint Exhibits #1-#3)

10. Article IV GRIEVANCE PROCEDURE, Section 4.5 of the parties' CBA at all times relevant to this matter describes the arbitrator's authority as follows:

The arbitrator shall use his/her best efforts to arbitrate the grievance, but he/she shall have no power or authority to do other than interpret and apply the provisions of this Agreement and he/she shall have no power to add to or subtract from, alter, or modify any of the said provisions.

(See Joint Exhibits #1-#3)

11. In the CBA's covering all relevant periods of time the parties did not provide the authority to determine arbitrability to the arbitrator.
12. Donald Boggis is a member of the bargaining unit who was hired into the Hollis school system in 2000 and is the employee subject of the grievance at issue in these proceedings before the PELRB.
13. On or about August 30, 2004 the Association filed a grievance on behalf of Mr. Boggis, referring to the date of grievance as 6/17/04, and expressing the grievance as, "Improper placement of [Boggis] on the salary schedule for the 2004-2005 school year. [Boggis] had been on BA30. He finished his master's degree. He was placed on MA track."
14. The Superintendent of Schools at that time, Kenneth L. DeBenedictis, denied the grievance by letter of September 9, 2004. (See Joint Exhibit #5)

15. On October 21, 2004 the Superintendent of Schools on behalf of the School Board, wrote to the president of the Association, David Olszewski, in response to the grievance appealed to the School Board regarding Mr. Boggis's "claim that he was improperly placed at the Master's rather than the Master's +30 level on our professional salary level." The letter further provided that the School Board "denied the grievance because of the contractual language of Article VII, Section 8.3 of the negotiated agreement." (See Joint Exhibits #1 through #3).
16. The October 21, 2004 superintendent's letter also explained that the [School Board] "agreed that if [Mr. Boggis] can substantiate his claim for +30 college credits, beyond the Bachelor's or Master's Degree, which were not used for the Master's Degree, then he would be in compliance with the language of the agreement and eligible for adjustment in salary."
17. Following receipt of the October 21, 2004 letter, the grievance on behalf of Mr. Boggis was withdrawn by the Association by letter dated November 5, 2004 and signed by the Association's president and "Grievance Chair", Rosemary Mezzocchi. (See Joint Exhibit #8). The letter did contain the reference to the withdrawal as "without prejudice". They did so with the belief that if Mr. Boggis could comply through substantiation, he would be reassigned to the higher track.
18. Following the withdrawal in 2004 no further steps in the grievance process were undertaken, Mr. DeBenedictis left employment as superintendent, and Richard Pike succeeded him in or about July 2005. Mr. Boggis continued in employment on the MA compensation track to which he had been assigned in 2004, after he had obtained his master's degree which had been the subject of the withdrawn grievance.
19. Approximately a year later in or about October of 2005 and following his hiring, the new Superintendent of Schools, Richard Pike, was informed during some informal meetings with representatives of the Association that he convened to "bring him up to speed," that they wanted him to review an issue involving improper assignment of a member on the compensation track. He was not aware of the previous documentation of the issue in 2004 when he agreed to review the issue. No grievance was pending or filed at the time of these discussions in fall of 2005.
20. In or about November of 2005, the Association president sent a letter with other historical documents relating to Mr. Boggis's claim to Superintendent Pike.
21. Subsequent discussion was conducted in November of 2005 between the Superintendent and Association representatives regarding the difference in the amount of compensation Mr. Boggis received in his current tract assignment and that which he would receive on the higher tract to which he claimed he was entitled.

22. In the Spring of 2006, Superintendent Pike discussed the issue of Mr. Boggis's salary track assignment with the School Board which declined to change its previous position on that issue.
23. In March of 2006, after hearing from Superintendent Pike of the School Board's decision, the Association's grievance chair requested and received a meeting to with the School Board regarding the Boggis issue and they did so.
24. James Murphy became the new chairperson of the School Board in March 2006. On or about March 29, 2006 Mr. Boggis met with Mr. Murphy regarding his track assignment. Mr. Boggis followed up on this meeting by submitting certain information by letter of April 1, 2006 alleged to support his claim of not being assigned to the proper compensation track. (See Joint Exhibit #12)
25. The School Board undertook additional review and discussion of the materials submitted on April 1, 2006 and declined Mr. Boggis's "request for placement on the salary schedule at Masters+30". (See Joint Exhibit #13)
26. On May 23, 2006 the Association informed the School Board by letter to its Chairman from the Grievance Chair that it was "forwarding the grievance for arbitration to [sic] Level D of the Grievance Procedure as outlined in Article IV." (See Joint Exhibit #14). This action was undertaken despite the fact that no formal grievance was pending during this period.
27. Arbitration was scheduled to be conducted on October 5, 2006. The record does not reveal the exact day the arbitration was requested by the Association or how the request was characterized to the arbitrator. Regardless, the Association made a unilateral decision in the Fall of 2006 to withdraw its request for arbitration with no other agreement having been made with management. As a result the arbitration hearing of October 5, 2006 was cancelled.
28. In or about August or early September of 2006, the start of the 2006-2007 school year, Mr. Boggis and the Associations knew or should have known that he had not been placed on the MA30 salary track dictating his compensation for that school year.
29. On December 12, 2006 the Association filed a Statement of Grievance with Superintendent Pike indicating the "Date of Grievance" as August 28, 2006. (See Joint Exhibit #16)
30. The December 12, 2006 grievance specifically referenced a violation of Article 8.2 of the parties CBA which provides:

Placement on the salary schedule at the time of initial hiring shall be in accordance with the Staff Member's total years of experience, highest degree held, and number of credits earned

beyond said degree. Subsequent placement on the schedule shall reflect additional experience, degrees, and credits earned.

31. The Association's grievance was denied at Level B by the Superintendent on December 21, 2006 citing as his grounds for denial, first that the grievance was not timely pursuant to Section 4.4 of the parties' CBA; and second, that Mr. Boggis had presented "no evidence of sufficient credits 'beyond' his Masters degree (as required by Section 8.3 of the Collective Bargaining Agreement), but rather numerous credits embedded within his Bachelor's degree". (Joint Exhibit #17)
32. On January 3, 2007 the Association referred the denial to the next grievance level, that being the School Board. (See Joint Exhibit #18)
33. On January 24, 2007 the School Board upheld the decision of the Superintendent and denied the grievance. (See Joint Exhibit #19). It is from this denial that the Association now seeks arbitration.

DECISION AND ORDER

JURISDICTION

The PELRB has exclusive original jurisdiction to determine whether a party to a dispute is entitled to submit an issue to arbitration where the parties have not specifically granted that authority to an arbitrator. This is a threshold consideration often referred to as "determining the arbitrability" of a issue. In this matter, the parties have not provided that authority to an arbitrator by the terms of their CBA or any other writing in evidence. Without that specific assignment of authority to an arbitrator, the PELRB generally either refers the matter to arbitration or finds that the party's request for arbitration constitutes a wrongful demand to use that forum resulting in the commission of an unfair labor practice. Here the School Board has alleged violations of RSA 273-A:5 II (f) by the Association based upon a wrongful demand to arbitrate and PELRB jurisdiction is appropriate.

We also take this opportunity to remind parties that the Public Employee Labor Relations Act (RSA 273-A), while providing the authority to award costs under certain circumstances, does not presently contain an express provision that permits the Public Labor Relations Board to award legal fees to either party to a proceeding before the agency. While a court may have such inherent authority, see *Emerson v. Town of Stratford*, 139 N.H. 629, 631, 660 A.2d 1118, 1120 (1995), the same is not true for a quasi-judicial administrative body. The remedial authority of such a body is expressly limited by statute. See *Appeal of Somersworth School Dist.*, 142 N.H. 837, 841, 713 A.2d 386, 389 (1998). See also *Appeal of Land Acquisition, LLC* (New Hampshire Bd. of Tax & Land Appeals) 145 N.H. 492, 497-498 (N.H. 2000).

DISCUSSION

This dispute involves two parties to a collective bargaining agreement which contains a grievance procedure that provides sequential levels of review and specific time deadlines for actions to be undertaken in pursuance of a grievance. Their substantive dispute arises from the placement of a teacher on one of several separate salary tracks described in the parties' collective bargaining agreement (CBA). The School Board's initial placement of the teacher, Donald Boggis, for the 2004-20005 school year was alleged by the Association to be improper. The Association filed a grievance pursuant to the terms of the parties' CBA. This grievance was filed on August 30, 2004. It expressed the grievance as, "Improper placement of [Boggis] on the salary schedule for the 2004-2005 school year. [Boggis] had been on BA30. He finished his master's degree. He was placed on MA track." The relief requested by the Association was for him "to be placed on MA30 track." (Joint Exhibit #4).

This grievance progressed through the parties' grievance procedure steps that, in sequence, produced a denial by Superintendent of Schools, Kenneth L. DeBenedictis, (Level B of grievance procedure) and a referral of the grievance to the School Board (Level C of grievance procedure). After considering the grievance, the School Board also denied the grievance relying on "the contractual language of Article VIII, Section 8.3 of the negotiated agreement." The Association and the teacher, Mr. Boggis, were informed of this decision by letter dated October 21, 2004. (Joint Exhibit #7). The written decision also provided that if Mr. Boggis "can substantiate his claim for +30 college credits, beyond the Bachelor's or Master's Degree, which were not used for the Master's Degree, then he would be in compliance with the language of the agreement and eligible for adjustment in salary."

On November 5, 2004 the Association, having reviewed the School Board's denial, wrote to the then chair of the School Board, Pam Kirby. Its responsive letter thanked the School Board for their letter and expressed, "At this time, the Hollis Education Association (HEA), on behalf of Donald Boggis, does not wish to pursue this grievance to the next level. We are withdrawing it without prejudice... The HEA appreciates the clarification that [the Superintendent] made for proper placement on the salary schedule." (Joint Exhibit #8). The School Board's denial of the grievance without a request for arbitration by the Association constituted a termination of that grievance and it was not referred to arbitration within the 30 days of receipt of the October 21, 2004 denial as set forth in the parties' grievance procedure and referred to as Level D.

Seven months later, Richard Pike was hired as the new Superintendent of Schools. In or about October 2005 and early November 2005, approximately a year after the School Board's denial of the grievance and the Association's letter indicating withdrawal, Mr. Pike convened several meetings with the Association to generally "bring him up to speed" as he assumed his new duties. One of the items brought to his attention by the Association was the Boggis salary track assignment issue that had been the subject of earlier grievance. The Association and newly hired superintendent discussed the issue and the financial difference in compensation Mr. Boggis received assigned to the "MA salary track" in comparison to what he would receive if assigned to the "MA+30 salary track".

In an undated letter, that we believe in the context of all of the evidence was transmitted in Fall of 2005, addressed to Superintendent Pike the Association president described the reason for the 2004 grievance and provided several documents related to Mr. Boggis' salary track assignment. After those salary discussion meetings and this letter, it appears from the evidence provided that no significant action was undertaken until the Association met with the newly elected School Board Chairman, James Murphy, on March 29, 2006. On April 1, 2006 the president of the Association sent a letter to the new School Board Chairman and enclosed several of Mr. Boggis' transcripts and historical documents, including the previous denial of the School Board dated October 21, 2004. On May 3, 2006 the School Board Chairman wrote to Mr. Boggis indicating that "...we must decline your request for placement on the salary schedule at Masters+30 as inconsistent with Article 8.3 of the Professional Staff negotiated agreement." The respective actions undertaken by the parties between October 21, 2004 and this May 3, 2006 letter were not in pursuance of a formal grievance as none was pending after the October 21, 2004 denial and the resulting termination of the grievance.

On May 23, 2006 the Association's grievance committee's chairperson, Rosemary Mezzocchi, wrote to School Board Chairman Murphy stating that the Association was "forwarding the grievance for arbitration to [sic] Level D of the Grievance Procedure as outlined in Article IV." (Joint Exhibit #14). This communication was clearly outside the parties' agreed Grievance Procedure as the grievance filed on August 30, 2004 was no longer pending and no mutual agreement had been reached to extend the time for the filing of any grievance pursuant to Article 4.6. This attempt to resurrect a formal grievance filed two years earlier and withdrawn unilaterally does not meet the timeliness requirements of the parties' grievance procedure. We do not see where any action undertaken by the School Board constituted any waiver of its rights under the terms of the CBA nor served to toll any Association obligations for timely action under the same terms of the parties' grievance procedure. Therefore any actions undertaken by the Association that lead to the scheduled arbitration hearing for October 5, 2006 were improper, notwithstanding the Association's unilateral withdrawal of its request for arbitration and of the eventual cancellation of the arbitration hearing.

Having wended our way through the chronological steps of the grievance filed by the Association on behalf of Mr. Boggis on August 30, 2004 we address the Association's next related grievance filing. We start with a review of the written Grievance Report Form (Joint Exhibit #16) filed with Superintendent Pike by the Association on or about December 12, 2006. We refer to this grievance as Grievance #2. We find that Mr. Boggis knew or should have known that he had not been placed on the MA30 track at a time earlier than twenty days prior to the December 12, 2006 filing date. That would render the December 12, 2006 grievance filing in violation of the parties agreement expressed at Article 4.4 of their CBA which provides:

A grievance to be considered under this procedure must be initiated in writing within twenty (20) school days of its occurrence, or within twenty (20) school days of when the party should have known of the occurrence.

The Superintendent denied Grievance #2 on December 21, 2006 at Level B of the parties' grievance procedure. The Association referred this denial to the School Board (Level C) by letter

dated January 3, 2004. (Joint Exhibit #18). Viewed in the context of the hearing and the testimony offered therein, this date is inaccurate as to the year in which it was sent. We find that the letter, if accurately dated, would bear the date January 3, 2007. This Association referral of Grievance #2 to the School Board was denied and the Association was informed of this denial by letter of January 24, 2007. The denials of Grievance #2 at Level B and Level C were based upon first, a determination that Grievance #2 was not filed in a timely manner; and second, that Mr. Boggis did not meet the criteria required to be placed on MA+30 track. Following those denials the Association demanded arbitration from which the School Board seeks relief from participating in arbitration through these proceedings.

In this matter we felt it necessary to relate the chronological facts as we have found them to be in order to clarify and resolve contrary positions of the parties expressed at the hearing as to the number of grievances actually filed. Having concluded that there were two and not three grievances we proceed to consider the parties' present dispute based upon the Association's filing of what we have referred to as Grievance #2 and the School Board's complaint that this grievance was not filed in a timely manner. To make this determination we do not address the merits of either of the grievances addressed by the parties during the hearing as to whether Mr. Boggis has been placed upon the proper salary track or whether he meets the requirements for placement on salary track MA30.

We look to the terms and provisions of the grievance procedure contained within the parties' CBA. When we do so we find that the parties have expressly and unambiguously defined the time limits within which a grievance shall be filed. Here they have done so in Article 4.4 where they agree that in order for a grievance to be considered it "must be initiated in writing within twenty (20) school days of its occurrence, or within twenty (20) school days of when the party should have known of its occurrence." Further, the parties agree that "Time periods specified in this procedure may be extended by mutual agreement." (Article 4.6). Thereafter it is excluded from consideration under the parties' grievance clause. We find the parties contract language to be clear and unambiguous as applied to the facts before us.

When we apply these criteria to the evidence presented by the parties it is clearly evident that the grievance before us, filed on December 12, 2006, was not filed within the time limits previously agreed to by the parties. Mr. Boggis was assigned to salary track MA after his attainment of his Master's degree in May 2004 and before the start of the 2004-2005 school year. He was later specifically denied assignment to the MA30 track on October 21, 2004 as a result of the Association's earlier grievance. Mr. Boggis remained on the MA track for the 2004-2005 school year, the 2005-2006 school year and into the 2006-2007 school year. We also do not find sufficient evidence to establish any mutual extension of the contractual time limits.

The Association urges us to recognize the court's findings in the *Appeal of Westmoreland School Board*, 132 NH 103 (1989) and that a presumption of arbitrability exists when there is an arbitration clause in the contract. However, it must be equally presumed that the parties' have expressed their intent in the terms and conditions of their CBA. That same court set an important condition upon that presumption when it stated that before an evaluation is undertaken to determine whether there exists "the most forceful evidence" to prevent a grievance from going to arbitration. That condition is that we must first find that "no express CBA provision precludes

such action." We have examined the parties' CBA in the instant matter and find that there is an express provision as expressed in Article 4.4 Time Limit. The parties clearly intended by the simple declarative language in that article to exclude stale disputes from arbitration. Therefore we need not pursue the complete *Westmoreland* evaluation, nor further interpret the parties' CBA.

When we compare the Association's statement of the first grievance in 2004 with its statement of Grievance #2, for all relevant purposes we find them to be the same. The record reveals that Mr. Boggis knew or should have known of his placement on salary track "MA", at least, when the first grievance was filed on August 30, 2004. Grievance #2 was filed on or about December 12, 2006. In the interim between those dates, we find no mutual extension of time entered into between the parties. We find no event or conduct that could be sufficiently interpreted to toll the running of the time period within which a valid grievance must be filed. Grievance #2 is essentially identical to the previous grievance filed approximately two years earlier. The 2004 grievance was expressed as, "Improper placement of [Boggis] on the salary schedule for the 2004-2005 school year. [Boggis] had been on BA30. He finished his master's degree. He was placed on MA track." The relief requested by the Association was for him "to be placed on MA30 track." This later grievance, Grievance #2, is essentially the same grievance using similar language, such as, "Donald Boggis is being paid improperly. He is currently being paid on the Master's track...[he]was placed at BA+30. Donald received his Master's Degree in May, 2004." This grievance also sought similar relief in the form of him being placed upon a step on the MA+30 track. The difference in Grievance #2 is that placement on the salary track is sought for the 2006-2007 school year. We find no material difference between Grievance #2 and the Association's 2004 grievance as each recites the basis for the grievance as the alleged improper placement of Mr. Boggis on the MA salary track instead of the MA+30 salary track. For all relevant purposes, we determine that Grievance #2 is a not a different grievance than the earlier filed grievance.

We conclude that the first Association grievance was terminated and that Grievance #2 is the same as the first grievance but filed two years later. We do not find that there was any mutual extension of the time limit required pursuant to the collective bargaining agreement nor other sufficient evidence presented by the Association to convince us that we should read the contract provision as being other than a clear expression that the parties wanted to limit to 20 days the period within which a written grievance is to be initiated. Certainly if the parties have any other intention, they are free to express it in their next collective bargaining agreement. Since we have made these determinations, we find that Grievance #2 was not filed in a timely fashion.

The Association asserts that Grievance #2, filed on December 12, 2006 is a timely filed grievance based upon the concept of "continuing violation." In effect the Association's argument is that each payroll that fails to compensate Mr. Boggis at the rate provided for by salary track MA30 is a separate and distinct violation of Article VII of the parties CBA. Limitations on actions involving labor disputes are analyzed from the determination of the date of the occurrence or the event which gives rise to the dispute. It is from that point, often referred to as the "triggering event," that the calculation of time begins. As advanced by us above, the parties in this matter have provided clear and express language in their agreement requiring a grievance to be "initiated in writing within twenty (20) school days of its occurrence, or within twenty (20)

school days of when the party should have known of the occurrence.” If an action is determined to be a “continuing violation” “it may be said to be repeated from day to day, with each day treated as a new ‘occurrence’.”(See Elkouri & Elkouri, How Arbitration Works, at 218-219 (6th ed. 2003). Our evaluation of whether or not a violation qualifies as a continuing violation involves considering whether the act complained of, in this instance, the action undertaken by the School Board to assign Mr. Boggis to a salary track may be repeated from day to day, with each day treated as a new occurrence. *Id.* We find that the assignment of Mr. Boggis to the MA salary track was a single and distinct act implemented in 2004 and while the effects may continue, the School Board is not reconsidering its 2004 decision every week or every pay period.

We find the Association in violation of RSA 273-A:5, II(f). The School Board is under no further obligation to deal with this grievance. The Association shall refrain from further demands for arbitration on Mr. Boggis’ salary track claim barring a change in his qualifications or circumstance that could present a separate and distinct act of the School Board from which a different grievance could arise and from which the Association could file a timely grievance, if necessary. Notice of this order shall be posted for a period of thirty days. No legal costs or fees are awarded.

So Ordered.

Signed this 26th day of December, 2007



Jack Buckley, Chairman

By unanimous vote. Chairman Jack Buckley presiding with Board Members James M. O’Mara, Jr. and Richard E. Molan also voting.

Distribution:

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